No. 15164.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a New York corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey corporation,

Appellee.

Appellee's Supplemental Answering Brief.

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TABLE OF AUTHORITIES CITED

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Appellee's Supplemental Answering Brief.

This case was before this Court on a previous appeal (under No. 14,258) in which a transcript of record and the following briefs were filed: Appellants' Opening Brief, Appellee's Answering Brief and Appellants' Reply Brief. The case was argued and submitted. The appeal was dismissed as premature because the trial court's judgment did not dispose of the whole case nor conform to Federal Rules of Civil Procedure, section 54(b); see 225 F. 2d 838. After the mandate of this Court was filed below, the trial court, on stipulation of the parties concerned, ordered the dismissal of a defendant concerning whom the judgment heretofore appealed from was silent. [Sup. R. 17-18.]

This case is before this Court again on the prior record plus the record of the proceedings had subsequent to the dismissal of the original appeal. Pursuant to stipulation and with the consent of this Court, the prior Transcript of Record, referred to herein as "R.", and the briefs heretofore filed will again be used. A Supplemental Transcript of Record, referred to herein as "Sup. R.", has been prepared and filed, and the original briefs are to be supplemented.

For convenience appellant Glens Falls Indemnity Company will be referred to as "Glens Falls" and appellant E. F. Grandy, Inc. will be referred to as "Grandy"; together they will be referred to as "appellants."

I.

Statement of the Pleadings and Facts Disclosing Jurisdiction.

The statement in Appellee's Original Answering Brief, on pages 1 and 2 thereof, is complete except for the dismissal of The Farmers and Merchants Bank of Long Beach, which is no longer a party to this action. Appellants have stated that they appeal from both the judgment from which the original appeal was taken and the judgment entered by the trial court subsequent to this court's dismissal of the original appeal; see page 2 of Appellants' Supplemental Opening Brief.

Appellee confirms that the judgment entered subsequent to the dismissal of the original appeal is correctly stated as to the amount thereof. [Sup. R. 28-29.]

II.

The Nature of the Proceedings in the Trial Court.

Appellants have endeavored to cloak with "confusion" the trial court's determination of the merits of this action and have carried this cloak of confusion into their appeal. On page 3 of their Supplemental Opening Brief, appellants state: "The proceedings in the trial court were confused from the beginning and continued so to the end." Faced with an adverse judgment appellants claim that the trial court never understood their side of the case. This approach to an adverse judgment is reminiscent of the unhappy judgment debtor being consoled by his trial attorney that the judge never understood their case, otherwise they would have prevailed.

At one point appellants assert that the record was "confused" and at another point, on page 18 of their Supplemental Opening Brief, appellants ask this court to render a new judgment based on the same record—the same facts and the same law—that was before the trial court. Appellants want to retry this case without new evidence and without new legal authorities. Let us look to the record established in the trial court.

The fundamental issues of appellee's case are set forth in its complaint filed nearly five years ago on July 2, 1952 [R. 3-9]; to date these issues have not changed. The answers filed by Glens Falls and Grandy on August 6, 1952, and on October 22, 1952, respectively, raised the same defensive issues that were before the trial court and that are now before this court. [R. 9-10, 14-16.]

Well in advance of the first pre-trial hearing the following documents developing the facts and law of the case were exchanged between appellee and appellants and

were filed with the trial court: (1) appellee's interrogatories and appellants' answers [R. 11-14, 17-23]; (2) appellee's request for admissions and Grandy's admissions [R. 26-28]; (3) appellee's Memorandum Brief; and (4) appellants' Pre-Trial Brief.

By stipulation of the parties no witnesses were sworn nor were depositions taken. The facts of the case were either agreed upon or presented at the first pre-trial hearing held on April 1, 1953. In this regard the trial court stated:

> "It is understood, pursuant to stipulation, the court will consider the statement of facts with the exception of the deletion I have indicated, which has been made by counsel for the plaintiff, and the statement of facts which has been filed in writing by the defendants and which he has adopted by reference, rather than restatement, as the evidence in the case.
>
> "The court will consider the exhibits which have been introduced today, providing that the genuineness of certain of them which counsel were not prepared to concede is hereafter conceded by letter; and that on the trial of this case we will try the issues of law, *counsel briefing those issues in advance of trial and appearing for such argument as they feel is indicated, and for such questions as the court might direct to them at that time.*" [R. 107-108.] (Italics ours.)

As to the time for filing additional briefs before the second court hearing, the trial court stated its order very clearly:

> "The court will order that either party may, but need not, file any brief in this matter within 20 days of the receipt of the transcript.

"The reporter will notify the court when the transcript is prepared, and I will have a copy of it.

"Within ten days of the filing of any brief which any party desires to file, the opposition may file the reply brief thereto. That will give us about 30 days from Monday.

"Then we will set a day for trial, it being my understanding that in all probability after the examination has been made of these documents, all we will have to try is the issues of law and not take evidence." [R. 111.]

The parties then stipulated and the court ordered that the time for argument would be on the afternoon of May 8, 1953. The certificate of the reporter indicates that the transcript of the April 1, 1953 pre-trial was available on April 6, 1953. Counsel for appellants was given more than a month after the availability of that transcript in which to submit any further briefs. Any further briefs were to be filed in advance of the May 8, 1953 trial, which was set for oral argument. However, for one reason or another, trial counsel for appellants did not prepare and submit additional briefs other than the Pre-Trial Brief submitted prior to the April 1, 1953 pre-trial.

At the May 8, 1953 trial no further evidence was submitted other than appellants' three exhibits and the introduction of appellee's exhibits which were already before the court at the April 1, 1953 pre-trial. Appellants advised the court that they rested on the evidence submitted. [R. 130.] As for oral argument the following discussion took place between trial counsel for appellants and the trial court:

"Mr. McCall: Your Honor, I believe that exhibits we presented to the Court have been introduced and received.

"The plaintiffs put in the contract and the bonds, which is our main defense, and *subject to the brief we will write with the Court's permission we rest.*

"The Court: That brings us to the time of argument.

"Are you prepared for oral argument today?

"Mr. McCall: *I was willing to waive oral argument if we filed briefs.*

"The Court: *Do you mind relieving me somewhat of judicial suspense?*

"Tell me the defense to this action and write the brief and back it up." [R. 130-131.] (Italics ours.)

Counsel for appellants then outlined the same defenses that appear in their prior pre-trial brief, in the brief that followed the May 8, 1953 hearing, in the motion for new trial briefed and argued by counsel associated in this appeal, and in the appellate briefs heretofore filed. [R. 131-134.] The trial court then ordered that any further briefs had to be submitted before the close of business on May 20, 1953. [R. 145.] Counsel for appellants filed a further brief a few days after the May 20, 1953 deadline but before judgment for appellee was entered.

After the trial court entered judgment for appellee, appellants' counsel associated in this appeal briefed and argued a motion for a new trial. [R. 57-58.] Thereafter, the trial court denied the motion for a new trial. [R. 58-59.]

III.
Prior Statement of Facts.

On page 7 of their Supplemental Opening Brief appellants concede that appellee's statement of facts in its Original Answering Brief is accurate except as to two statements. Therefore, only the two statements need be discussed here.

On said page appellants have incorrectly restated, *viz.*, "the specifications required that certain materials be purchased from appellee," the statement appearing on page 3 of appellee's Original Answering Brief:

> "In accordance with the specifications of said subcontract, it was necessary for V. L. Murphy to obtain from the American Seating Company, appellee, certain material and equipment which are described as a chemical sink, a chemical table, and a chemical fume hood."

The specifications required the installation of the equipment [R. 156, 161, 163-166], that equipment had to be obtained from a supplier such as appellee, and Grandy knew that the particular supplier was appellee. [Admission No. 3 at R. 27; Exs. 8, 11.] Glens Falls knew or should have known that the subcontract specifications required the equipment in question and that such was to be obtained from a supplier such as appellee. [Exs. 3, 4.]

Appellee made the following statement on page 3 of its Original Answering Brief:

> "The general contractor, Grandy, forwarded the purchase order to the American Seating Company *and knew that this material at the agreed price was*

to be installed by American Seating Company into the project which Grandy contracted to construct for the United States Government." (Italics ours.)

Appellants in the statement of facts in their Supplemental Opening Brief do not contest the accuracy of the italicized part of the sentence. For clarity the first part of the sentence should read: "The general contractor, Grandy, forwarded to the naval officer in charge the purchase order awarded to the American Seating Company."

IV.
The Issues Involved.

The essential issues involved in this appeal are:

A. Has the trial court abused its discretion in denying appellants' motion under Federal Rules of Civil Procedure, Section 60(b)?

B. Is Grandy contractually liable to appellee?

C. Has Glens Falls obligated itself to appellee under the common law performance and payment bonds?

V.
The Evidence in Support of the Trial Court's Findings and Judgment.

Appellee does not undertake to present herein all of the evidence in the case which substantiates the findings and judgment by the trial court.

A. There Is Substantial Evidence to Support the Findings and Judgment Regarding Grandy's Contractual Liability to Appellee.

Appellee's quotation for the materials it furnished for installation under the government contract was sent

to Grandy and stamped "received" by Grandy. [R. 79; Ex. 5.] The purchase order awarded to appellee was stamped "received" by Grandy. [R. 82; Ex. 7.] Copies of the purchase order were transmitted by Grandy to the Navy. [R. 163; Ex. 8.] Correspondence was sent to Grandy by appellee concerning completion of the work. [R. 164; Ex. 9.] The correspondence was forwarded by Grandy to the Navy. [R. 165; Ex. 10.] A letter dated January 6, 1950, was sent by Grandy to appellee regarding non-compliance with specification requirements. That letter [Ex. 11] includes a request by Grandy for completion of appellee's work so that funds could be received:

> "You are, no doubt, aware that the above mentioned noncompliance constitutes a very effective block to receipt of funds for work already performed on the contract at Seal Beach.
>
> "In view of this condition, it is requested that your firm make all possible effort to comply with the required work outlined in the enclosed letter." [R. 166.]

From the evidence it has been established that Grandy knew the source of the materials needed for completion of the prime contract, had requested that the work by appellee be completed so that funds could be received, and yet Grandy, after suggesting to the subcontractor that the subcontract be assigned to a bank [Ex. 1], without notice to appellee, continued to make payments to the assignee bank. There was no evidence introduced by Grandy that it ever demanded a statement from the assignee bank or from the subcontractor that appellee had been paid for the required materials. In addition, Grandy should have been aware of its obligations to appellee, for Article 6(d) of the

contract between Grandy and the Government [Ex. B] provides on page 4 of said contract:

> "The obligation of the Government to make any of the payments required under any of the provisions of this contract (including those of Articles 25 and 26) shall, in the discretion of the Contracting Officer, be subject to (1) any unsettled claims against the Contractor for labor and materials. . . ."

The trial court was justified in inferring from the evidence that an implied-in-fact contract existed between Grandy and appellee. Even in the absence of an implied-in-fact contract, the trial court could properly hold that there was an implied-in-law obligation for the payment by Grandy to appellee for the materials furnished by appellee.

B. The Performance and Payment Bonds Are the Best Evidence of the Contractual Liability of Glens Falls to Appellee.

At the April 1, 1953 pre-trial, counsel for Glens Falls recognized that the "bonds speak for themselves" [R. 72-73]; nevertheless, in Appellants' Supplemental Opening Brief there are conjectures as to the intent of the parties, substantiated only by self-serving conclusions that the parties "intended" for the bonds to protect Grandy only; see page 42 of Appellants' Original Opening Brief.

The bonds are before this court as Exhibits 3 and 4.

VI.

Argument.

A. The Trial Court Has Not Abused Its Discretion in Denying Appellants' Motion Under Federal Rules of Civil Procedure, Section 60(b).

This issue is raised by appellants in Point 7 of their argument and represents their latest effort to conceal the basic inadequacies of their case. Appellants virtually devote their Supplemental Opening Brief to this issue alone and the fundamental questions going to the merits of the case are submerged. Although we must address ourselves to this issue raised by appellants, we urge this court to note particularly our subsequent arguments under this section which pertain to the fundamentals of this action.

After reading Section II of this brief it should be apparent to this court that the issues of this case have been clear from the start, that appellants were given more than ample opportunity to present the facts and law of their case to the trial court, that the same facts and law upon which appellants urge this court to render a new judgment were considered by the trial court, and that the trial court founded its judgment upon the basic merits of appellee's case and upon the basic inadequacies of appellants' case.

Appellants cite Rule 60(b)(1) as a basis for relief from the adverse judgment. Unable to show "mistake, inadvertence, surprise or excusable neglect" appellants argue that Rule 60(b)(1) may be applicable to mistakes of law and cite *Moore's Federal Practice* for that proposition. Even the passages quoted from the cited text require that "error of law apparent" must be first established, assuming that that rule covers such errors. After

many opportunities appellants were unable to satisfy the trial court that there was any "error of law apparent," and it was within the proper discretion of the court to rule against the Rule 60(b) motion if based on that ground.

However, appellants concede that they are not really relying on clause (1) of Rule 60(b), by the manner in which they phrased their question 7 on appeal and by stating on page 14 of their Supplemental Opening Brief that "there is another clause which is most applicable to the unusual situation presented by the instant case." Appellants base their Supplemental Opening Brief on the "other reason clause," clause (6) of Rule 60(b).

The only direct authority which appellants cite, when asking this court to reverse the trial court's denial of the Rule 60(b)(6) motion, is the case of *Klapprott v. United States,* 335 U. S. 601 (1949). In that case by a close 5-4 decision, with vigorous dissents, the Supreme Court vacated a *default* judgment from the District Court which had cancelled citizenship by naturalization. The opinion of the Court carefully detailed the facts justifying relief from the default judgment: (1) the petitioner had no hearing in the trial court and thus no opportunity to present his defense, (2) he had no counsel for the action, and (3) he was in jail at the time of the entry of the default judgment without funds, and (4) the United States did not introduce any corroborating evidence.

Speaking for the Chief Justice, for Justice Jackson and for himself, Justice Reed, in a dissenting opinion, stated at 335 U. S. 627:

> "The limitations imposed by Rule 60(b) are expressions of the policy of finally concluding litigation within a reasonable time. *Such termination of*

lawsuits is essential to the efficient administration of justice. I would not frustrate the policy by allowing litigants to upset judgments of long standing on allegations such as Klapprott's." (Italics ours.)

Four of the Supreme Court Justices would not apply the "other reason" clause to the facts of the *Klapprott* case. *A fortiori* the "other reason" clause should not be applicable here.

Appellants at page 15 of their Supplemental Opening Brief take from the opinion of the Court in the *Klapprott* case the bare proposition that a judgment may be vacated "whenever such action is appropriate to accomplish justice." While trying to point out "irregularities" and "confusion" in the proceedings below, appellants specify no prejudicial errors that precluded fair, impartial hearings or that interfered with the right to be heard.

As Justice Reed cautioned in his dissenting opinion in the *Klapprott* case, 335 U. S. 620-627, justice requires that there be an end to litigation. This fundamental axiom in the judicial administration of justice was well stated by the trial court in this case:

> "The Court: This court felt that the plaintiff had made out a case and that the matter having been submitted, the court having decided in favor of the plaintiff, that the fact that a defense might have been more expertly set forth is just a burden which defendants have along with the plaintiffs.
>
> "Parties who come into the court must get their cases properly presented at the trial, and there must be a finality to decisions, *having once found—and I see no reason to think I was wrong—that there was liability here.* Although there was an error in the computation, that has now been corrected by stipulation.

> "I think I will deny your present motion, Mr. Stephens, and let the appellate court review the record which was made here in part by your predecessor who tried the case differently, I suppose, that you would try it.
>
> "But if we adopted some other rule it would mean that every time a lawyer adopts a trial method and selects and rejects the matters which he will bring before the court and makes the wrong choices, that a litigant could then go out and get more expert counsel, come in and get a new trial.
>
> "So I deny the present motion." [Sup. R. 93.] (Italics ours.)

The views of the trial court in this case and of Justice Reed in his dissent in the *Klapprott* case conform to Rule 1 of the Federal Rules of Civil Procedure, which designates the scope and interpretation of the Rules:

> "These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 60(b) must be so construed.

Appellee filed its complaint nearly five years ago to recover payment for materials furnished more than six years ago. Appellants have been given a fair and complete hearing. The judgment is affirmable because it is supported by the law and facts of this case. The trial court properly exercised its discretion in denying the motion under Rule 60(b).

B. Under the Facts and the Law, Grandy Is Contractually Liable to Appellee.

The evidence, discussed in Section V A. of this brief, and the inferences which may be drawn from such evidence, substantiate Grandy's contractual liability to appellee. In particular, Exhibit No. 11 is the basis for an implied-in-fact contract whereby Grandy requested and received materials required before the government would pay under the prime contract. Grandy implied that appellee would receive its share of the funds. Moreover, under the prime contract, particularly paragraph 6(d) thereof, Grandy should have protected appellee's share of the funds. Nevertheless, Grandy, after obtaining performance from appellee, continued to make payment to the assignee bank. No inquiry was made by Grandy as to whether appellee was being paid by the assignee bank or by the subcontractor. Now Grandy joins Glens Falls in denying any rights to appellee for recovering under the subcontractor's bonds.

The facts of this case require the application of *section* 1589 *of the Civil Code of California,* which provides:

> "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

The facts here are stronger than those required by the Code, for here Grandy requested and received the benefit of appellee's performance.

Also applicable is the equitable doctrine set forth in *section* 3521 *of the Civil Code of California:*

> "He who takes the benefit must bear the burden."

C. Appellant Glens Falls Has Obligated Itself to Appellee Under the Common Law Performance and Payment Bonds.

This supplements the argument appearing in Appellee's Original Answering Brief, particularly pages 16 through 19 thereof.

Glens Falls argues as follows:

1. That under the common law performance and payment bonds there was no intention to protect materialmen, such as appellee, who are strangers to the bonds, for such strangers were to be protected by the Miller Act;

2. That there was no intention for the performance bond to insure payments for materials;

3. That there was no intention for the payment bond to insure payments to materialmen.

These arguments are answered in a recent line of cases, which are supported by the California cases previously cited in Appellee's Original Answering Brief.

In *McGrath v. American Surety Company,* 307 N. Y. 552, 122 N. E. 2d 906 (1954), the plaintiff performed work for a plumbing subcontractor to a general contractor under a prime contract with the federal government. The general contractor posted Miller Act performance and payment bonds. The action was brought against the surety for the plumbing subcontractor; no action was commenced under the Miller Act. Defendant surety moved to dismiss the action, and the trial court and the intermediate appellate court denied the motions for dismissal. The New York Court of Appeals reversed the two lower courts and held that the rights of laborers and materialmen were fixed and protected by the Miller Act; there was no cause of action against the subcontractor's surety

because the parties only intended for the bond to protect the general contractor against Miller Act liability.

The decision in the *McGrath* case has been criticized in the *Socony-Vacuum* case, *infra,* has been criticized by Professor Corbin in his treatise on Contracts, cited *infra,* and has been "distinguished" in the *Daniel-Morris* case, *infra,* which was decided in the same jurisdiction as the *McGrath* case.

In *Socony-Vacuum Oil Co. v. Continental Casualty Co.,* 219 F. 2d 645 (C. A. 2d 1955), plaintiff was a supplier to a subcontractor performing work under a prime contract for construction of a radar station for the federal government. Defendant was surety under a common law bond naming the prime contractor as obligee and the subcontractor as principal. The action was not brought on the prime contractor's Miller Act bonds; the plaintiff had failed to perfect his rights against the surety on the prime contractor's payment bond within the time limitations of the Miller Act. Defendant surety moved in the trial court for a dismissal of the action on the ground that plaintiff had no rights in the bond because the bond was for the protection of the prime contractor only. The trial court dismissed the action; the Court of Appeals for the Second Circuit reversed and held that the materialman had a right of recovery on the bond.

The common law bond in the above case provided:

> "Whereas, the above bounden Principal has entered into a certain written contract with the above named Obligee, dated the 8th day of May, 1950, for the construction of Roads, Parking Areas, etc. at St. Albans, Vermont.
>
> "Which contract is hereby referred to and made a part hereof as fully and to the same extent as if copied at length herein.

> "Now, Therefore, The Condition of the Above Obligation Is Such, That if the above bounden Principal shall pay all labor and material obligations and shall well and truly keep, do and perform, each and every, all and singular, the matters and things in said contract set forth and specified to be by the said Principal kept, done and performed at the time and in the manner in said contract specified and shall pay over, make good and reimburse to the above named Obligee, all loss and damage which said Obligee may sustain by reason of failure or default on the part of said Principal, then this obligation shall be void; otherwise to be and remain in full force and effect."

The Second Circuit held that under the above bond there was a promise to pay labor and material obligations and stated at 219 F. 2d 647:

> "Professor Corbin in his work on the law of contracts, 4 Corbin on Contracts, Sections 798-804, had this to say: '* * * the third party has an enforceable right if the surety promises in the bond, either in express words, *or by reasonable implication*, to pay money to him. If there is such a promissory expression as this, there need be no discussion of 'intention to benefit.' We need not speculate for whose benefit the contract was made, or wonder whether the promisee was buying the promise for his own selfish interest or for philanthropic purposes. It is a much simpler question: Did the surety promise to pay money to the plaintiff? . . . This doctrine, we think, has the support of the great weight of authority.'" (Italics ours.)

The court instructed the trial court to not speculate as to the intent or motives of the parties to the bond, for the language or the reasonable implication of the

language controls. Appellants here have already speculated extensively as to the reasons for their conclusion that it was the intention of the parties to protect Grandy only. In that regard, the Second Circuit further stated at 219 F. 2d 648:

> "We are unable to recognize either the validity or the relevance of the conclusion of the trial judge that the bond was given only for the benefit of the prime contractor and not for the protection of materialmen. Doubtless the prime contractor in requiring a bond of its subcontractor sought protection against his own liability to materialmen of the subcontractor. But this he obtained through a bond requiring payment of the materialmen. Obviously it was contemplated that performance under the bond would benefit not only the prime contractor who would thereby be exonerated from liability to the materialmen thus paid but also the materialmen of the subcontractor who were thereby to be paid."

As to the failure of the materialman to bring a timely suit against the prime contractor and its surety under the Miller Act, the Court stated at 219 F. 2d 648:

> "The situation is affected not at all by the fact that the plaintiff failed to perfect its rights under the Miller Act against the prime contractor and its surety. The bond now sought to reach was not one required under that Act and the rights to which it gave rise are not qualified by the Act or conditioned upon the timely pursuit of remedies under that Act. The rights under this bond must be determined by its language interpreted as of the date it was given. At that time, of course, it was not known whether all or some of the materialmen would fail or decline to press their rights under the Miller Act."

Appellants here have argued that the clearly stated obligations of Glens Falls under the performance bond, which the leading case of *Pacific States Co. v. U. S. Fidelity & G. Co.,* 109 Cal. 691, 293 Pac. 812 (1930), construes as including a promise to pay materialmen, are of no legal consequence in light of a supposed intent of the parties to separate performance and payment into two bonds. As to this point, the criticism by the Second Circuit in the *Socony-Vacuum* case, at 219 F. 2d 649, regarding the *McGrath* case, should be considered:

> "We do not blink the fact that the *McGrath* case, as far as appears from the facts stated in the opinion, is legally indistinguishable from that now before us. True, in McGrath the subcontractor furnished both a payment bond and a performance bond whereas here a single bond is involved which is conditioned both for payment of 'material obligations' and for performance of the subcontract. *But this, we think, is a difference without legal significance.* Both the *Spokane* and the *McGrath* cases and others of similar purport we think out of line with the great weight of authority referred to above. *With deference, we suggest that it is unfortunate doctrine to modify the scope of a plainly stated written obligation in a private bond by the supposed motive of the obligee, as these cases seem to do.* Such doctrine leads to unnecessary and undesirable uncertainty in business relationships. It means that one within the orbit of a private bond cannot rely upon a plainly stated obligation, instead he must search for the undisclosed motive of the parties and take that as the measure of his rights." (Italics ours.)

At the trial of the instant case counsel for Glens Falls recognize that "the bonds speak for themselves" [R. 72,

73], yet in the appellate briefs counsel for Glens Falls talk about the "intent" of the parties, perhaps fearful that the bonds speak too clearly for themselves.

The performance bond in this case includes a promise to pay materialmen, as stated in the *Pacific States* case, *supra,* which is a leading California decision. In accord with the holding in the *Pacific States* case, Professor Corbin, on page 27 of the 1956 Pocket Part to 4 *Corbin on Contracts,* section 799, states:

> "When a subcontractor promises the general contractor to furnish all necessary labor and material, he impliedly promises that such labor and material will be paid for. Also when the subcontractor gives a surety bond conditioned on full performance of his contract, the surety also promises that the labor and materials will be furnished and paid for."

And in 4 *Corbin on Contracts,* section 799, page 168, there is the following statement:

> "A surety bond that is conditioned on full performance of his contract by the principal, will operate in favor of such third parties as the principal, by his contract with the promisee, undertakes to pay; the bond need be no more specific."

In the *Socony-Vacuum* case the Second Circuit concludes its opinion at 219 F. 2d 649 with the following statement:

> ". . . It follows that the surety should not be allowed to avoid the obligation which it was paid to assume by suggesting that as things turned out the obligee did not need all the protection which was bargained and paid for. Were we to hold otherwise, we should in effect, by substituting a mere contract

> for indemnity for the bond which was made, be presenting the defendant surety company with an unearned windfall."

The bond in the *Socony-Vacuum* case contains a promise that "the principal (subcontractor) shall pay all labor and material obligations" and a promise to reimburse the obligee for "all loss and damage which said obligee may sustain by reason of failure" of the subcontractor to make such payments. Here the performance bond provides that "the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract." The California Supreme Court in the case of *Pacific States Co. v. U. S. Fidelity & G. Co.,* 109 Cal. 691, 293 Pac. 812 (1930), construed the performance bond as including a promise to pay materialmen. Professor Corbin, as cited above and as cited by the Second Circuit in the *Socony-Vacuum* case, agrees with the view of the California Supreme Court that the language of the performance bond by reasonable implication includes a promise to pay materialmen.

The payment bond in this case contains language similar to language in the bond in the *Socony-Vacuum* case, to-wit:

> ". . . and hold the said obligee free and harmless from and against all loss and damage *by reason of its failure to promptly pay all persons supplying labor and materials* used in the prosecution of the work provided for in said subcontract . . ." (Italics ours.)

Professor Corbin on page 23 of the 1956 Pocket Part to 4 *Corbin on Contracts* section 798 criticizes the *McGrath* case and states that it "is a case that would be

decided differently in other courts," and on page 26 of that Pocket Part he approves of the *Socony-Vacuum* case. Also on page 26 of the same Pocket Part, Professor Corbin notes that the case of *Daniel-Morris Co. v. Glens Falls Indemnity Company,* 308 N. Y. 464, 126 N. E. 2d 750 (1955), in holding the surety liable to a materialman under a payment bond, made a "futile attempt to distinguish" the *McGrath* case. The *Daniel-Morris* case came from the same court that handed down the much criticized *McGrath* decision. While striving to distinguish the *McGrath* decision, the New York court, clinging somewhat to the "intent to benefit" doctrine, at least made a step forward when it noted the difference between "motivation" and "intent to benefit," by stating at page 753 of the National Reporter citation:

> "The intention to benefit the materialmen must not be confused with the motive of the parties in entering into the bond. Big-W's (the general contractor) demand for indemnification, as pointed out in the opinion below, 'supplies the motive in securing the undertaking rather than the intent as to who shall be benefited.' Once the right is created the law furnishes a remedy irrespective of the motivation of the parties."

The language of the performance bond in this case includes a promise to pay materialmen. Appellants urge this court to disregard the plain provisions of the performance bond and ask this court to conjecture as to the intent of parties to the bond. Appellants state that the performance bond does not include payment, because the parties "intended" for the payment bond to cover payments for materials; appellants then state that it was their

"intent" for the payment bond merely to indemnify Grandy, so in effect there is no bond coverage for appellee. This court should not tolerate such legerdemain, just as the trial court did not tolerate it.

VII.
Conclusion.

The liability of Grandy and of Glens Falls to appellee has been established by the facts and law of this case. Appellee respectfully submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

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